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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922. No. 332.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE EIGHTEENTH DISTRICT OF OHIO, Petitioner,

v.

WILLARD STORAGE BATTERY COMPANY, a corporation.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PHILIP DECHERT,
CHARLES C. NORRIS, Jr.,
of Dechert & Norris.
AUGUSTUS B. STOUGHTON,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 329.

C. F. Routzahn, Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, Petitioner,

v.

Willard Storage Battery Company, a Corporation.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio (R. 52) is not reported. The opinion of the Circuit Court of Appeals (R. 261) is reported in 65 F. (2d) 89.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered May 9, 1933 (R. 261). Jurisdiction is invoked by Petitioner under Section 240(a) of the Judicial Code.

QUESTIONS PRESENTED.

Stated in Petition.

STATUTES AND REGULATIONS INVOLVED.

Section 900, Revenue Act of 1921, 42 St. L. 227 (Appendix p. A-12). Section 600, Revenue Act of 1924, 43 St. L. 253 (Appendix, p. A-12). Section 424, Revenue Act of 1928 (Appendix, p. A-13). Treasury Regulations 47, Art. 15, revised January, 1922 (Appendix, p. A-1). Treasury Regulations 47, Art. 16, revised August, 1924 (Appendix, p. A-1). Treasury Regulations 74, Art. 1255, 1928 (Appendix, p. A-2).

ARGUMENT.

1. AS TO PETITIONER'S FIRST GROUND.

This Court in 1930 settled the law involved in the case at bar and clearly defined a "part" for an automotive vehicle under the pertinent Revenue Laws in the case of UNIVERSAL BATTERY COMPANY v. UNITED STATES, 281 U. S. 580; 74 L. Ed. 1051 (1930), and in so doing approved the definition adopted by the Treasury Department. The short excerpt from the opinion in that case in the Petition for Certiorari does not reflect the decision in that it omits the controlling factors of the definition. This Court said:

> "The administrative regulations issued under Section 900 uniformly have construed the term 'part' in that Section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial commodity as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation, and which is primarily adapted for such use whether or not essential to the operation of the vehicle.
>
> "This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years, and it ought not to be disturbed now unless it is plainly wrong. We think it is not so, but is an admissible construction. Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. Magone v. Wiederer, 159 U. S. 555, 559, 40 L. Ed. 258, 259, 16 Sup. Ct. Rep. 122. We think the view taken in the administrative regulations is reasonable and should

be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they were not so well adapted."

The Regulations of the Treasury Department construing the term "part" in the Revenue Acts involved in the case at bar, and to which this Court referred in the above case, are set forth on page A-1 of the Appendix to this brief.

The Court below found that the Respondent's batteries were commercial commodities in wide, general and common use before they were used on automobiles (R. 39—Finding No. 10); that after they were used on automobiles they always continued to be, and now are, such commercial commodities in wide, general and common use for a great many different purposes (R. 40—Finding No. 14); that they were equally well adapted for a great many other uses other than on automobiles, and were so used (R. 40—Finding No. 16); that such other uses were not incidental to their use on automobiles (R. 40—Finding No. 15); that they were not designed for automobiles (R. 39—Finding No. 12); and were not primarily adapted for use on automobiles (R. 40—Finding No. 16). The Findings *in extenso* are printed in the Petition for Certiorari on pages 3, 4, and 5, and as stated by the Circuit Court of Appeals below (R. 264, 265) were supported by "a wealth of evidence," which was not controverted.

Every factor of the definition of this Court and of the Regulations of the Treasury Department determinative as to what does not constitute a "part" is fully and completely found upon a mass of uncontroverted evidence.

In the UNIVERSAL case, *supra*, this Court cited the case of MAGONE v. WIEDERER, 159 U. S. 555, 559, 40 L. Ed. 258, 259, 16 Sup. Ct. Rep. 122 (1895), which in turn cites the case of MAGONE v. HELLER, 150 U. S. 70; 37 L. Ed. 1001 (1893). These cases decide that the chief or principal use of an article is determinative of its proper tariff classification, *unless* at the same time the article is commonly, practically and widely used for other purposes, and that if it is equally well adapted for these other uses, it cannot be considered to

be an article primarily adapted for such use, even if in the majority of cases it is so used. The Court below found that the Respondent's batteries were commonly, practically and widely used for other purposes; were equally well adapted for these other uses; and were not primarily adapted for use on the automotive vehicles mentioned in the pertinent Revenue Acts. The Circuit Court of Appeals below in its opinion (R. 265) stated that the batteries in suit were equally applicable for some "eighty or more different purposes each unconnected, or unrelated to use on automobiles." This, together with the Findings of wide, general and common use and equal adaptation, to which reference has been made, under the authority of this Court in the UNIVERSAL case, *supra*, and the MAGONE v. WIEDERER case, *supra*, precludes the application of the test of chief use, and brings the definition of Respondent's batteries squarely within the language of this Court in the UNIVERSAL case, *supra*, to wit: **"Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use on motor vehicles, must be classified as parts or accessories for such vehicles."**

In another sense, the Court below did not disregard "chief use," for it refused the Petitioner's specific request to find that the chief use of the batteries in suit was on automobiles (R. 34—Request No. 14), (R. 42), and, to the contrary, found that they were commonly, widely and generally used for a great many other purposes, to which they were equally well adapted, and were so used, and were not primarily designed nor adapted for use on automobiles (R. 39, 40—Findings 10 to 17 inc.).

None of the cases cited by Petitioner are in conflict with the opinion of the Circuit Court of Appeals in the case at bar, but all are in complete harmony with each other and with the above cited decisions of this Court: PHILADELPHIA STORAGE BATTERY COMPANY v. LEDERER, 21 F. (2d) 320 (D. C. E. D. Pa. 1927), is not in conflict, and no appeal was taken from the judgment in favor of taxpayer. MCCAUGHN v. ELECTRIC STORAGE BATTERY COMPANY, 63 F. (2d) 715, decided in the Circuit Court of Appeals for the Third Circuit on January 31, 1933, involved identically the same

issue, and the Findings were, in all respects similar to those in the case at bar. The opinion in that case is in complete harmony with that in the case at bar, and no appeal was taken from that decision in favor of the taxpayer, although the amount involved exceeded the aggregate amount of the five consolidated cases at bar. The opinion in WIER v. MCGRATH, 52 F. (2d) 201, was affirmed by the Circuit Court of Appeals for the Sixth Circuit, 41 F. (2d) 1021, in 1930 prior to the decision of this Court in the UNIVERSAL case, *supra*, and is in complete harmony with the opinion at bar and with the decisions of this Court. The opinion below does not conflict with that of the Circuit Court of Appeals for the Second Circuit in the case of EATON v. AMERICAN CHAIN COMPANY, 63 F. (2d) 783 (1933), and follows, and is in harmony with, the decision of this Court in the UNIVERSAL case, *supra*. That case was vastly different from the one at bar, in that, as found by the Court of Appeals, the articles in question (tire chains) were primarily designed and primarily adapted for use on the automotive vehicles stated in the Revenue Acts; that there was no evidence that they were equally well adapted for other uses; and that the only other use found was on automotive vehicles, and even as to this other use that there was no evidence of equal adaptation.

2. AS TO PETITIONER'S SECOND GROUND, WHICH SHOULD BE RESTATED AS FOLLOWS:

Does Section 424 of the Revenue Act of 1928 oust the jurisdiction of the United States Courts to determine in a suit against the Collector of Internal Revenue whether or not manufacturer's excise taxes under the Revenue Acts of 1921 and 1924 were erroneously and illegally assessed and collected, and vest the determination of such question exclusively in the Commissioner of Internal Revenue?

The fallacy of the Petitioner's contention is apparent when it is realized that the suit at bar is a personal action against the Collector in his individual capacity to determine whether

the taxes were illegally and erroneously collected, and is not an action against the United States. SMIETANKA V. INDIANA STEEL CO., 257 U. S. 1, 66 L. Ed. 99 (1921).

The filing of a Certificate of Probable Cause under the provisions of Section 989 of the Revised Statutes, Act of 3 March, 1863, ch. 76, 12 Stat. L. 741 (Appendix, p. A-2) merely relieves the estate of the Collector against liability for payment of the judgment, and has the effect of converting the judgment into the *nature* of a claim against the United States; FLANDERS V. SHELVE, 105 U. S. 718, which the sovereign will recognize and pay only when, and in the manner, prescribed by Congress.

The section of the Act in question has a perfect application to payment of a judgment against the Collector as distinguished from a right of action to determine the illegality of the collection of the taxes. By virtue of the Regulations of the Treasury No. 74 (1928) Article 1255, 322 C.C.H. 1669 (Appendix, p. A-2), after a judgment is obtained against a Collector, there must be filed with the Commissioner a Claim for Refund, and it is to this refund, or repayment, which Section 424 has perfect application. The proof of this construction lies in the fact that the Section in question is taken solely from the Deficiency Appropriation Acts of February 28, 1927; 44 Stat. Page 1261 (Appendix, p. A-3); December 22, 1927; 45 Stat. 30 Ch. 5 (Appendix, p. A-4); and March 5, 1928, 45 Stat. 169, Ch. 126 (Appendix, p. A-5), all which statutes were for the appropriation of monies, and clearly restricted payment out of these appropriations to refund of taxes by the Commissioner only when the conditions therein provided shall have been satisfied. "Refund" in Section 424 of the Revenue Act of 1928, therefore, clearly means final "repayment," and has no application to a "right of action" to determine the illegality of the collection of taxes. Applying this construction to the case at bar, after the judgment against the Collector has become final the Respondent must file its Claim for Refund for the amount of the judgment, and before final payment by the Commissioner it must comply with the provisions of Section 424 of the Revenue Act of 1928.

This is the construction of the Section adopted by the Circuit Court of Appeals for the Third Circuit in MCCAUGHN

v. ELECTRIC STORAGE BATTERY CO., 63 F. (2d) 715, entered on January 31, 1933, from which no appeal was taken.

The District Court below entered an opinion on December 16, 1929, in the case at bar, dismissing the Petitioner's motion to dismiss upon exactly the ground raised in the Petition for Certiorari, and in that opinion West, *J.*, states that Jones, *J.*, who wrote the opinion in STERLING SPRING CO. v. ROUTZAHN cited on page 11 of the Petition for Certiorari, concurred with him that Section 424 did not oust the jurisdiction of the Court to determine the illegality of the collection of tax. (Appendix, p. A-6.) The decisions of the Court of Claims in the case of JEFFERSON ELECTRIC MFG. CO. v. UNITED STATES, 69 Ct. Cls. 150 (1930), and in BOYLE VALVE COMPANY v. UNITED STATES, 38 F. (2d) 135 (1930), are in exact accord with the Circuit Court of Appeals below.

The Petitioner's contention that the provisions of Section 424 of the Revenue Act of 1928, ousts the jurisdiction of the Courts to determine illegality of collection of the tax is clearly without foundation, because:

First: The Section does not specifically take away the jurisdiction of the Court by repealing the provisions of Section 3226 of the Revised Statutes (Appendix, p. A-11).

Second: If the contention is correct, the Section creates a limitation upon right of action which ends thirty days prior to the date of its passage, and while Congress may shorten the period of limitation, it may do so only upon condition that a reasonable time be given by the new law for the commencement of an action before the bar takes effect; KOSHKONONG v. BURTON, 104 U. S. 668, 26 L. Ed. 886 (1881).

Third: The ousting of the jurisdiction of the Court to determine the illegality of the collection of the tax, and vesting it in the Commissioner of Internal Revenue is clearly unconstitutional in that it violates the guarantee of the due process provision of the Fifth Amendment to the Constitution: TUMEY v. OHIO, 273 U. S. 510, 71 L. Ed. 749 (1927); PHILLIPS v. COMMISSIONER, 283 U. S. 589, 75 L. Ed. 1289 (1931).

Fourth: The Petitioner's contention presents a clear encroachment upon the judicial power of the United States by the Legislative branch of the Government prohibited by Section 1 of Article III of the Constitution: OWENSBORO v. LUCAS, 18 F. (2d) 798 (1927); OHIO VALLEY WATER CO. v. BEN AVON BOROUGH, 253 U. S. 287, 64 L. Ed. 908 (1920); "ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW" by JOHN DICKINSON, Vol. II, p. 271.

It is too well settled to admit of argument that the construction of a statute which raises a serious doubt as to its constitutionality will not be considered unless there is no other interpretation open. LUCAS v. ALEXANDER, 279 U. S. 573, 73 L. Ed. 851 (1929); ROUTZAHN v. TYROLER, 36 F. (2d) 208 (1929) (C. C. A. 6th); certiorari denied in 281 U. S. 734, 74 L. Ed. 1149.

It is submitted, therefore, that Section 424 of the Revenue Act of 1928 has a plain meaning which makes it applicable to refund or final payment by the Commissioner after final judgment upon the issue as to the illegality of the collection of the taxes, and that to place upon it the construction contended for by the Petitioner is to strain the plain language used in order, at best, to force an unnatural inference which will violate the constitutional provisions.

Respectfully submitted,

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For Respondent.

APPENDIX.

PHOENIX

TREASURY REGULATIONS 47, revised January 6, 1922.

"ART. 15. *Definition of parts.* A 'part' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

"The term includes bodies, wheels, engines, springs, axles, radiators etc. When sold separately a side car and a so-called trailer or 'semitrailer' so designed that a portion of the load or the weight thereof is carried or borne by the tractor or 'semitractor' are taxable as 'parts.'

"Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not 'parts' within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

"Component parts of articles taxable under this definition are taxable when sold separately if they have reached such stage of manufacture that they are primarily adapted for use as a component part. Blow-out shoes are subject to tax as 'parts' regardless of the fact that they may be made from old casings."

TREASURY REGULATIONS 47 (August 1924).

ART. 16. A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair or replace a component part of any such vehicle, or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is an article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

SECTION 989 REVISED STATUTES, ACT OF 3 MARCH, 1863 CH. 16; 12 STAT. L. 741.

(Sec. 989) When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer; but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

ARTICLE 1255, REGULATIONS OF TREASURY, NUMBER 74 (1928) 322 CCH. 1669.

"Claims for refund in case of judgment obtained against collector.—(a) Claims for the amount of a judgment against a collector of internal revenue for the recovery of taxes, penalties, or other sums should be made on Form 843 and filed with the Commissioner of Internal Revenue, Washington, D. C. The claimant should state the grounds of his claim under oath, giving the names of all the parties to the suit, the cause of action, the date of its commencement, the date of the judgment, the court in which it was recovered, and its amount. To this affidavit there should be annexed a certified copy of the final judgment in duplicate, a certificate of probable cause, and an itemized bill of the costs paid, receipted by the clerk or other proper officer of the court."

EXCERPT FROM DEFICIENCY APPROPRIATION ACT FEBRUARY 28, 1927, 44 STAT. P. 1261.

An act making appropriations to supply urgent deficiencies in certain appropriations for the fiscal year ending June 30, 1927, and prior fiscal years, and to provide urgent supplemental appropriations for the fiscal year ending June 30, 1927, and for other purposes.

TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE.

Refunding taxes illegally collected: For refunding taxes illegally collected under the provisions of sections 3220 and 3689, Revised Statutes, as amended by the Revenue Act of 1918, 1921, 1924 and 1926, including the payment of claims for the fiscal year 1928 and prior years, $175,000,000.00, to remain available until June 30, 1928: Provided, that no part of this appropriation shall be available for paying any claim allowed in excess of $75,000.00 until after the expiration of 60 days from the date upon which a report giving the name of the person to whom the refund is to be made, the amount of the refund, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation: Provided further, that a report shall be made to Congress of the disbursments hereunder as required by such Acts, including the names of all persons and corporations to whom payments are made together with the amount paid to each: Provided further, that no part of this appropriation shall be available to refund any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless the Commissioner of Internal Revenue certifies to the proper disbursing officer that such manufacturer, producer or importer has filed with the

Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after the passage of this Act, was filed before the allowance of the claim by the Commissioner.

EXCERPT FROM FIRST DEFICIENCY APPROPRIATION ACT FOR FISCAL YEAR 1928, DECEMBER 22, 1927, 45 STAT. 169.

Provided further, That no part of this appropriation shall be available to refund any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless the Commissioner of Internal Revenue certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption

(whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after the passage of this Act, was filed before the allowance of the claim by the Commissioner.

EXCERPT FROM TREASURY AND POST OFFICE APPROPRIATION ACT FOR FISCAL YEAR 1929, MARCH 5, 1928, 45 STAT. 30.

Provided further, That no part of this appropriation shall be available to refund any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless the Commissioner of Internal Revenue certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after the passage of this Act, was filed before the allowance of the claim by the Commissioner.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Willard Storage Battery Company, Plaintiff.	AT LAW	15761
v.		15762
		15763
C. F. Routzahn, Collector of Internal Revenue, 18th District of Ohio, Defendant.		15764
		15765

OPINION HANDED DOWN DECEMBER 16, 1929, UPON MOTION TO DISMISS.

WEST, *District Judge:*

Until these matters were argued, I was unaware that the question raised by the motions had been previously considered and passed upon by Judge Jones in Sterling Spring Co. *v.* Routzahn, Collector, No. 15574. In conference with him, he expressed the opinion that his memorandum should not be regarded as the law of the district on the question presented in these motions, especially since no review of that case was taken.

Plaintiff sues the collector for the recovery of the manufacturer's excise taxes paid on electric storage batteries and erroneously imposed, as it is claimed, under Secs. 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924. The taxes are alleged to have been illegal, because the batteries sold by plaintiff did not constitute parts or accessories for any of the articles enumerated in subdivisions (1) or (2), Sec. 900, Revenue Act of 1921, or in subdivisions (1) or (2), Sec. 600, Revenue Act of 1924, and neither the batteries nor the sales thereof by plaintiff were subject to be taxed. Defendant moves to dismiss on the ground that Sec. 424, Revenue Act of 1928 (Sec. 2424, Tit. 26, U. S. C.) deprives plaintiff of its privilege of refund and of maintaining an action begun subsequent to May 29, 1928; for lack of jurisdiction in the court to review the discretionary power vested in the Commissioner by the provisions of said Sec. 424, and because that section provides an exclusive remedy. Said section reads as follows:

"No refund shall be made of any amount paid or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, direcly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."

Since its enactment, the excise taxes mentioned in the first clause, however illegal or erroneous, can be refunded only in accordance with its provisions.

It is the defendant's contention that a discretionery power is committed to the Commissioner with respect to all the said illegal exactions, except such as are covered by the judgment of

a court mentioned in sub (1); and that, in the exercise thereof, the Commissioner alone must determine whether or not the taxes were lawful, the courts being deprived of all jurisdiction in the premises.

I can not agree with this view, and in my opinion, the language of the statute leads directly to another result. Under sub (2) claims for excessive taxes collected upon sales or leases which were properly subject to a lesser tax, and claims for illegal taxes which either were not collected by the taxpayer from the purchaser or lessee, or if collected, have been returned to him, are dealt with by the Commissioner. But whether his power with respect to such claims or any of them is final, and what if any jurisdiction the courts may have as to such claims, seems to me beside the precise question involved. For, under the averments of the plaintiff's petitions, the claims sued on are of an entirely different character. The taxes were not assessed in an excessive amount upon sales which were taxable, and there is no intimation, either in the petitions or motions that they were not collected from, or were returned to the purchasers of the articles. The distinction between taxes which are excessive in amount and those which are entirely illegal, was clearly in the mind of Congress. This is shown by the Report No. 2 of the Committee on Ways and Means of the House, of December 7, 1927, wherein, at p. 27, after stating that the committee did not believe that, as a general principle, taxes paid upon articles subsequently held to be not taxable should be refunded and thus unjustly enrich the manufacturers, who merely collect the tax from the persons to whom they sold the articles, it is said:

> "However there are some cases where refunds should properly be made. Accordingly section 424 of the new bill provides that judgments of the court should be paid if the action was begun prior to the effective date of the Deficiency Act. It also provides that refunds may be made whenever the taxpayer can establish to the satisfaction of the Commissioner that the amount be paid was excessive (not by reason of the fact that the article was wrongly taxed, but by reason of the fact that the tax was improperly computed)."

The language of the section naming as one condition upon which refunds may be made that "it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax," embodies the view of the Committee. It further appears by Conference Report No. 1362, May 25, 1928, that the original bill passed by the House, prohibited refunds except upon conditions, one being: "or (2) unless the amount was an ordinary over-payment of the amount due upon the sale of an article actually subject to the tax."

A tax wholly unauthorized, is not within sub (2), unless it has been passed on to the purchaser or lessee; but falls within subdivision (3) of section 424, and is to be refunded upon the giving of bond conditioned that within six months it will be repaid to the United States, unless in the meantime distributed to the consumers.

The report of the Ways and Means Committee above mentioned, closes with the statement that "in all other cases" (other than those covered by (1) and (2) the taxpayer "must comply with conditions similar to those imposed by the proviso in the deficiency act and give a bond conditioned upon the refund of the tax to the ultimate consumer."

It is quite clear from this report that the Committee which announced that as a general principle, taxes paid upon articles subsequently held not taxable ought not to be refunded so as to unjustly enrich the manufacturer, did not regard the temporary refund under sub (3) of the section as being contrary to this principle, evidently because it is not for the benefit of the manufacturer, but solely for that of the consumer.

The court therefore concludes that as to claims such as those of the plaintiff, there has been no effort by Congress to give the Commissioner final power to determine their legality. When presented, he may reject such a claim because he believes that the taxes imposed were not illegal, or for any other sufficient reason, but his action is not final; and the question of legality then becomes one for the courts to determine. Power finally to decide upon the legality of the exaction must reside somewhere, and where the entire amount of such excise taxes is involved, it rests, since the enactment of section 424, just where it did before—that is, in the courts.

Williamsport Wire Rope Co. v. U. S., 277 U. S. 551, is relied upon by the defendant. It was there held that the power of the Commissioner in determining whether a corporation is entitled under Sections 327 (a) (b) of the Revenue Act of 1919 to have its war and excess profits taxes fixed by a special assessment under Section 326, by a comparison with the taxes of other representative corporations engaged in like business, is discretionary and not subject to review by the courts. But the language of these sections, as well as the many reasons advanced by the Supreme Court why such a construction was necessary to the consistent administration of the law, sufficiently distinguishes that case from these. Whether or not plaintiff's batteries were accessories within the meaning of the revenue acts, is a question to the determination of which the courts are entirely competent. In the view of the court, there is nothing in the language employed in section 424 which confers discretionary power upon the Commissioner to finally decide upon the legality or illegality of the taxes imposed upon the plaintiff, nor is any reason apparent why such final jurisdiction should have been conferred.

The question now before the court is the plaintiff's right to bring and maintain these actions. They are against the Collector and seek personal judgments only. Whether or not they finally result in collectible claims against him or the United States, the court is bound to entertain them, unless prevented by section 424. It can not now be known with certainty that any judgments recovered will be paid by the United States. Smietanka v. U. S., 257 U. S. 1, 4. If no certificate of probable cause issues by the court and the United States does not become liable, nothing in section 424 relating to refunds from the U. S. Treasury can possibly affect the controversy between the plaintiff and the defendant as it will then stand. That section, whatever power it may confer upon the Commissioner, and take from the courts with respect to the determination of facts as the basis of refunds, would not seem to affect the jurisdiction to maintain an action against a collector for recovery of any excise taxes, even though of a class covered by its provisions.

But if it were now certain that a certificate would issue,

the court is of opinion that the section does not cut down the court's jurisdiction, with respect to the particular claims involved in these cases.

If illegality of these taxes is established by judgments, refunds will not be made "pursuant to" such judgments, within the meaning of Sec. 424, sub (1); but pursuant to sub (3), and will be conditional and for the benefit of consumers.

If the petitions may be entertained, it is no objection that they were filed subsequently to April 30 or May 29, 1928.

The motions will be overruled.

S. H. WEST,
Judge.

SECTION 3226 R. S. AS AMENDED BY SECTION 1113 REVENUE ACT, 1926.

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

(*b*) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924.

REVENUE ACT OF 1921. 42 ST. L. 227. TITLE IX.

Sec. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased:

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in sub-division (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in sub-division (1) or (2), 5 per centum.

Act passed November 23, 1921.
Effective November 23, 1921.

REVENUE ACT OF 1924. 43 ST. L. 253. TITLE VI.

Sec. 600. On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased:

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000. and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200. (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the

sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this sub-division, be considered to be a sale of the chassis and of the body.

(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts and accessories therefor sold on or in connection therewith or with the sale thereof) except tractors, 5 per centum. A sale or lease of an automobile shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body.

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in sub-division (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in sub-division (1) or (2), 2½ per centum. This sub-division shall not apply to chassis or bodies for automobile trucks, automobile wagons or other automobiles.

Act passed June 2, 1924.
Act effective July 3, 1924.

SECTION 424, REVENUE ACT OF 1928.

(*a*) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed

with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

(*b*) The second proviso under the heading "Internal Revenue" in section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading "Internal Revenue Service" in section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed.

Act passed May 29, 1928.